Nos. 85-98, 85-99

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ANSCHUETZ & Co., GmbH,
Petitioner,

v.

MISSISSIPPI RIVER BRIDGE AUTHORITY, *et al.*,
Respondents.

MESSERSCHMITT BOLKOW BLOHM, GmbH,
Petitioner,

v.

WALKER, *et al.*
Respondents.

On Petitions for Writs of Certiorari to United States Court of Appeals for the Fifth Circuit

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SUPPLEMENTAL BRIEF OF THE AMICUS CURIAE FEDERAL REPUBLIC OF GERMANY

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Pursuant to Rule 22.6 of the Rules of this Court, which the amicus curiae deems to be the most nearly applicable, the Federal Republic of Germany herewith respectfully files this brief for the purpose of calling to the Court's attention

the diplomatic note presented by the Federal Republic of Germany to the United States Department of State on April 8, 1986, which is attached hereto. This note underscores the strong interest of the Federal Republic of Germany in obtaining review by this Court of the important issues raised in these cases.

In *Anschuetz* the Court of Appeals for the Fifth Circuit held that "the Hague Convention has no application at all to the production of evidence in this country by a party subject to the jurisdiction of a district court pursuant to the Federal Rules."

The Solicitor General admits that this holding, which he refers to as a mere "statement", is "plainly overbroad" (Brief of Solicitor General, at 17 n.21), that the comity analysis of the *Anschuetz* court is "cursory" (Br. at 13) and that the decision contains "some troublesome language" (Br. at 6), yet he supports the decision for its supposed correct result. However, it is these flawed aspects of *Anschuetz* which other courts have subsequently relied on when ruling on the applicability of the Convention.[1]

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[1] *See, e.g., In re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120, 124-25 (8th Cir. 1986) (relying on *Anschuetz* and holding that when a district court has jurisdiction over a foreign litigant the Hague Convention does not apply to the production of evidence in that litigant's possession, even though the documents and information sought may be physically located within the territory of a foreign signatory to the Covention); *Lowrence v. Weinig*, 107 F.R.D. 386, 389 (W.D. Tenn. 1985) (holding that no comity analysis is necessary when production of documents located abroad is to occur in this country); *see also In re Ljusne Katting*, A.B., No. 85- 2573 (5th Cir. 1985) (citing with approval *Anschuetz* "overbroad" statement, but holding that the Convention must be used when deposing foreign nationals in their home country or inspecting premises in a foreign country).

The Federal Republic of Germany is concerned that the trend toward improved judicial assistance between the United States and the Federal Republic of Germany, reflected by the ratification of the Hague Evidence Convention, may have been halted or even reversed by this decision. The Court should therefore grant certiorari to narrow *Anschuetz* and to enuciate the elements of a proper comity analysis to be used in connection with the Convention.

Respectfully submitted,

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APPENDIX

APPENDIX A

Embassy of the
Federal Republic of Germany
Washington, D.C.

The Embassy of the Federal Republic of Germany presents its compliments to the Department of State and has the honor to make the following comments on the amicus curiae brief for the United States in the matters of Anschuetz & Co. GmbH, petitioner, v. Mississippi River Bridge Authority, et al, and Messerschmitt-Boelkow-Blohm, GmbH, petitioner, v. Virginia Walker, et al.

The Embassy has taken note, with surprise, of the US Government's recommendation to the Supreme Court not to grant certiorari in a matter on which the Federal Republic of Germany has, throughout the years, continously expressed its grave concern.

In its brief, the US Government seriously underestimates the German Federal Government's resolve concerning German judicial sovereignty which is embedded in the German constitution, and, therefore, cannot be waived by the government. Whether evidence is to be taken on German territory or taken from German territory to another country, the German parties or witnesses concerned have a constitutional right that a German judge supervise the process of taking evidence lest certain fundamental rules of the German law be violated.

The respect of another country's judicial sovereignty is the very principle of international law upon which all international treaties on judicial assistance are based and which the Federal Republic of Germany hoped to see observed by the United States when becoming a party to the Hague Evidence Convention.

Furthermore, the US Government's brief fails to take account of the fact that evidence taken in the Federal Republic of Germany under the procedure of the Hague Evidence Convention can be utilized in American courts.

Verbatim transcripts of witnesses' testimony can be taken and American parties may be present and ask questions at court hearings. Although the taking of documentary evidence is not yet possible in the Federal Republic of Germany during the pre-trial stage, witnesses may be questioned by German courts on the contents of documents located in the Federal Republic of Germany to the extent such documents are relevant to the litigation. The practice of substituting the testimony of witnesses for pre-trial production of documents has in the past been used by US parties seeking evidence in the Federal Republic of Germany.

Thus, through exhausting convention procedure, infringement upon German sovereignty can be avoided without impairing the US interest in granting US plaintiffs such access to evidence as they may need to obtain proof for their claims against German defendants.

The Federal Republic of Germany continues to support petitioners' request in Anschuetz that the US Supreme Court grant certiorari and render a decision taking into account the respect of other countries' sovereignty which is the fundamental principle on which international law is based.

Washington, D.C., April 8, 1986